



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Southern CAD/CAM

File: B-244745

Date: November 13, 1991

George Keritsis for the protester.
Millard F. Pippin, Department of the Air Force, for the agency.
Jeanne W. Isrin, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Offeror bears responsibility for conveying its offer, including source control drawings required to evaluate proposed alternate, to the designated government office on time; where drawings were allegedly transmitted by telefacsimile, but agency denies receipt and there is no proof of receipt, offeror bears risk of nonreceipt.

DECISION

Southern CAD/CAM protests the award of a contract to Source Diversified, Inc. under request for proposals (RFP) No. F41650-90-R-A241, issued by the Department of the Air Force for engineering workstations at Kelly Air Force Base, Texas. Southern principally alleges that the agency improperly failed to evaluate its low-priced alternate proposal based on its failure to furnish required drawings; Southern claims it furnished the drawings.

We deny the protest in part and dismiss it in part.

The solicitation was issued on December 21, 1990, on an unrestricted, firm-fixed-price basis. It specified a 10 percent preference for small disadvantaged businesses (SDB), pursuant to Department of Defense Federal Acquisition Regulation Supplement § 252.219-7007, and provided for award to the low, technically acceptable offeror. Four offers were received, two from SDBs. Southern submitted essentially alternate proposals--one based on the Hewlett-Packard brand name components specified in the RFP for items 0001, 0002, and 0004, and one that provided alternate part numbers for those items. The alternates were evaluated by the government engineer and determined unacceptable.

By letter of March 13, 1991, the contracting officer advised Southern of the alternates' deficiencies and the corrections necessary in order for its proposal to be considered for award. When Southern responded by letter of March 18, its response was evaluated by agency engineering personnel, but again was found unacceptable. By letter of March 20, the Air Force informed Southern that its proposed alternates remained unacceptable, and requested that Southern submit source control drawings for the alternates.¹ The agency advised that evaluation of the drawings would be necessary to determine whether the alternate items were brand name equivalents, and that failure to submit such drawings by March 27, the deadline for concluding initial discussions, would preclude further consideration of the alternates it offered, and result in consideration of only its brand name prices. The Air Force asked Southern to send a copy of the drawings by telefacsimile to expedite processing, and then subsequently to forward the original drawings. The Air Force reports it never received the drawings, telefacsimile copies or originals.

Best and final offers (BAFO) were requested on May 16 with a due date of May 23. Southern again responded with alternate proposals for the same items. As the alternates had never been approved, however, the contracting officer evaluated Southern's proposal based on its brand name prices totaling \$144,132 (including \$16,170 for the item 0002 brand item). Since Southern certified that it was not an SDB, the 10 percent evaluation factor was added to its offer, for a total evaluated price of \$158,545.20. On June 28, award was made to Source based on its low price of \$156,492.84.

Southern contends that, properly evaluated, its proposal was the lowest technically acceptable offer, even after the addition of the SDB preference, and that it therefore should have been awarded the contract. Southern does not challenge the Air Force's determination that the source control drawings were necessary to establish the acceptability of its proposed alternates, or the deadline established by the agency for receipt of the drawings. Rather, Southern claims that it transmitted a copy of the source control drawings for its item 0002 alternate by telefacsimile on March 26, pursuant to the request of contracting officials and prior to the March 27 conclusion of initial discussions, the deadline established by the agency; Southern speculates that the drawings were misplaced by contracting officials as a

¹According to the agency, source control drawings are used to identify approved sources for the various subassemblies which comprise the end item and the applicable technical specifications, quality control inspections and environmental screening requirements.

result of a reorganization in the procurement office. Southern argues that since it timely transmitted a copy of the requested source control drawings, the agency should have evaluated the 0002 alternate as equal to the brand name product and based its price evaluation on the lower price for the alternate item, \$11,970, instead of \$16,170 for the brand name product. This would have resulted in a total evaluated price of \$153,925.20 (with the 10 percent SDB preference), which would have made Southern the low offeror.

An offeror who proposes an alternate product must provide sufficient documentation to reasonably demonstrate that its product will satisfy the government's requirements. Advanced Seal Technology, Inc., B-242361 et al., Mar. 29, 1991, 91-1 CPD ¶ 341. Furthermore, the Federal Acquisition Regulation (FAR) places the burden on offerors to see that offers and any modifications to them reach the designated government office on time. FAR § 15.412(b); see Carter Mach. Co., Inc., B-245008, Aug. 7, 1991, 91-2 CPD ¶ 143. In particular, contractors using facsimile transmission to file documents assume the risk of nonreceipt. See, e.g., Comspace Corp., B-243166.2, June 27, 1991, 91-1 CPD ¶ 610; Adrian Supply Co.--Recon.; Western States Elec., Inc., B-227022.3; B-227022.4, Feb. 23, 1988, 88-1 CPD ¶ 184.

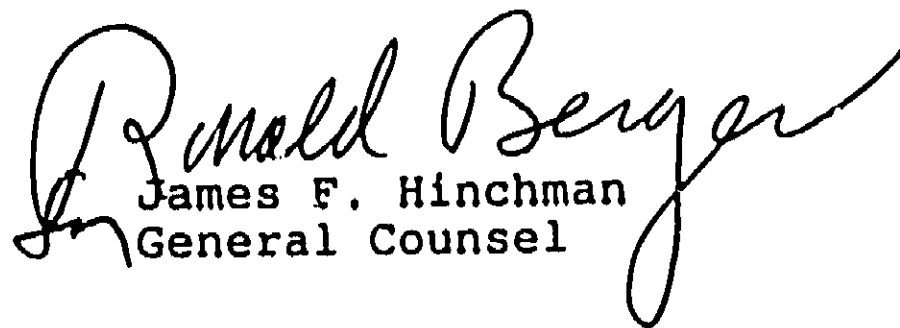
Southern states that on March 26, at 9:25 a.m., it faxed 12 pages, consisting of a cover letter and the source control drawings for the item 0002 alternate, to the contracting officer. As sole support for its conclusion that the agency therefore received the drawings at that time, Southern has produced what it describes as a copy of the fax machine's transaction report for the transmission, which indicates a transmission of 12 pages to the agency's fax machine on March 26. This document is inadequate, by itself, to establish receipt by the agency. In this regard, where a transmission record is in the protester's control, as was the transaction report for Southern's fax machine, it can be created or altered to support a protester's contentions; for example, the internal clock in the fax machine can be reset to show transmission at a time other than the actual time of transmission. Accordingly, we do not consider a transmission record which is in the protester's control to be definitive evidence of transmission. See The Jewett-Cameron Lumber Corp., 67 Comp. Gen. 22 (1987), 87-2 CPD ¶ 378 (telegraphic transmission). Moreover, evidence of a fax transmission does not establish receipt where, as here, contracting officials deny receipt and there is no other conclusive, contemporaneous evidence of receipt. See R&J Mfg. Co., B-235305, Aug. 18, 1989, 89-2 CPD ¶ 150; see also Western Alaska Contractors, J.V., B-241839, Mar. 5, 1991, 91-1 CPD ¶ 248 (telegraphic modification). Furthermore, Southern does not claim, nor does the record

show, that it sent a copy of the original drawings as requested by the agency.

Given the absence of independent evidence (outside the offeror's control) documenting receipt by the Air Force of the source control drawings necessary to determine the acceptability of Southern's item 0002 alternate, we find that the agency properly proceeded on the basis that the drawings had not been received, and therefore properly evaluated Southern's proposal on the basis of the proposed brand name items.

Southern also argues that the solicitation was "clearly 'tilted' in favor of" the brand name products and should have been revised to promote full and open competition. Our Bid Protest Regulations, however, require that protests based on alleged solicitation improprieties be filed prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). Southern did not raise this challenge to the item specified in the RFP until after award; this aspect of its protest therefore is untimely.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel